Office-Supreme Court, U.S.
FILED
MAY 8 1963
JOHN F. DAVIS, CLERK

No. 984

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

GUILLERMO GONZALEZ, et al.,
Appellants,

vs.

CITY OF CHICAGO, a municipal corporation,
Appellee.

On Appeal From The
Supreme Court of Illinois

BRIEF OF APPELLANTS IN OPPOSITION TO THE MOTION OF APPELLEE TO DISMISS THE APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

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The Scheffer Press, Inc.—ANdover 3-6850

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I.

The Hearings Before the Chicago City Council Met Neither the Requirements of the Federal Housing Act nor of Due Process of Law.

Appellee's motion and brief appear to argue that the federal Housing Act and contitutional due process require at most a legislative hearing before condemnation begins; that such a hearing was held in this case; and that all other defects in the Illinois procedure are cured by the very narrow hearings held by the Circuit Court in the instant case. Appellants maintain that each of

these positions is inadequate to resolve the statutory and constitutional difficulties presented; and therefore a substantial federal question exists.

A. Not Even a Legislative Hearing Was Held by Any Appropriate Body in This Case.

As appellee points out, the Chicago City Council did hold a legislative hearing prior to its ratification of the Chicago Land Clearance Commission's prior designations and renewal plans. Appellee now seeks to cure the defects in the Illinois procedure by stating that the Land Clearance Commission (and its successor, the Department of Urban Renewal) really did nothing; it was the Chicago City Council which made the "legislative declaration of the area as slum and blighted" (Motion and Brief p. 3). By this argument, appellee attempts to assert that appellants had a legislative hearing, prior to the first effective action, and hence the requirements of due process under the Fourteenth Amendment to the United States Constitution and the hearing requirement in the federal Housing Act (42 U.S.C. 1455(d)) have been met. This argument relegates the action of the Chicago Land Clearance Commission into a mere formality of the thinnest substance. It speaks as though the City Council was the only body really making the designation and planning decisions.

It is obvious that the Illinois legislature thought otherwise. The Urban Renewal Consolidation Act, 67½ Ill. Rev. Stat. 1961 §§91.101-136, and its predecessor, the Blighted Areas Redevelopment Act, 67½ Ill.Rev.Stat. 1961 §§63-91, mention the Chicago City Council in a number of ways, and gives the Council certain powers of veto. But the entire argument of appellees depends upon a section of the statute never quoted. The Illinois Blighted

Areas Redevelopment Act (67½ Ill.Rev.Stat. 1961 §75) states:*

> "Whenever a Commission determines that a particular slum or blighted area, or any other area which may constitute a redevelopment project, as herein defined, should be acquired pursuant to the provisions of this Act, such determination together with an accurate description of the area included in such determination and the date on which the determination was made shall be immediately set forth in the records of the Commission. Such determinations by a Commission may be made from time to time and need not all be made at one time. Each such determination shall be evidenced by a resolution adopted by the Land Clearance Commission.
>
> ". . . A certified copy of such resolution shall be delivered to the State Housing Board and to the governing body of the municipality in which the area is situated. No such determination shall be of any force or effect until such time as it has been approved by the State Housing Board and the governing body of the municipality in which the area is situated. 1947, July 2, Laws 1947, p. 1072, §13; 1949, Aug. 3, Laws 1949, p. 997, §1."

All the investigative and inquisitorial powers of the urban renewal program are conferred upon the Land Clearance Commission and its successor, the Department of Urban Renewal. See 67½ Ill. Rev.Stat. 1961 §§73, 74, §91.110, §91.124(k). None is conferred upon the City generally.

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* The present effective equivalent of this section in the Consolidation Act is 67½ Ill.Rev.Stat. 1961 §91.111. However, the Consolidation Act eliminates the requirement of Housing Board approval.

Appellee's extended attempt to make the Chicago City Council the deciding body, and its hearing an adequate procedural substitute, fails to note a necessary characteristic of a satisfactory legislative hearing: *the capacity for differentiated response.* Under the Illinois statutes the Chicago City Council could only accept or reject the Land Clearance Commission's designation. It could not modify, it could not respond to suggestions, and even if it attempted to do so, it lacked the investigative and inquisitorial powers necessary to make a sophisticated response. Congress, in requiring a public hearing (Federal Housing Act, 42 U.S.C. 1455(d)), probably intended that the body conducting the hearing be capable of a differentiated response; and a hearing before a body capable of such a response is, appellants assert, a minimum of due process. By the time a project has reached the stage of planning and designation by a local urban renewal body, and where the City Council has merely a veto, the burden of persuasion put upon the protestants is, as a practical matter, almost impossible to meet. Such a hearing cannot be a dialogue or argument of relative values: it becomes an all or nothing affair, nearly worthless to those who would protest the projected action.

B. A Legislative Type Hearing, Even If it Had Been Held, Is Inadequate to Protect the Statutory and Constitutional Rights of Appellants.

Even if the City Council's powers in regard to urban renewal had been sufficient to render its hearing an adequate legislative hearing, no such hearing is adequate to effectuate the Congressional purpose in the federal Housing Act and the minima of due process required by the Fourteenth Amendment. Appellants will not at this time elaborate on the positions stated in their Juris-

dictional Statement (pp. 20-23) and in the Petition for Certiorari in No. 861, the related federal case (pp. 26-29).

Appellee suggests that since the amount of the award was not appealed, no injuries could have been sustained which are recognizable before this Court. This assumes that a wrongful taking can be released by just compensation*—which this Court has never stated.

If appellants had been permitted, prior to the designation, to have a judicial hearing on the question of the existence of slum and blight and the validity of the taking, the condemnation proceedings could be relegated to the simple question of the award, with perhaps a judicial review of the support in the record of the administrative findings. Furthermore, the postponement to the condemnation proceedings of any hearing on public use gives an overwhelming advantage to the condemning body. It can pick and choose its defendants, gradually disintegrate the community, and then sue the objecting landowner after the neighboring population has disappeared,—apart from the fact that in Illinois only title holders of record are parties to condemnation proceedings.

C. The Judicial Hearing Held in the Instant Case Was Inadequate Even If it Had Been Timely.

Appellee's principal argument appears to be that aplants are asking the Court to review a moot matter and examine some hypothetical question. Much is made of

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* Both parties were clear that appellants, in accepting judgment for a specific award, were waiving any appeal on the amount of the award, but that no consent judgment was otherwise entered.

supposedly extensive hearings on the allegedly sole relevant issue. Appellee has shown in the Jurisdictional Statement (pp. 23-31) that the hearings in the Circuit Court proceeded on legal theories so vague as to render them no satisfactory adjudication of the rights of the parties. The Illinois Supreme Court not only affirmed the judgments below, but practically made vagueness a virtue. Even as to the sole narrow issue presented in these hearings—whether the Roosevelt-Blue Island area was slum and blighted—the hearings failed to give appellants any framework within which issues could be resolved. For the reasons shown elsewhere in this brief (pp. 11-13) it is pointless to argue that appellants have had a hearing when at such hearing no consistent or satisfactory definition of the statutory terms can be agreed upon by the witnesses.

In Roosevelt-Blue Island one parcel owner was called upon to litigate the issues involved in some 300 parcels. He was not permitted to make any preliminary use or take any advantage of the studies which (one would like to assume) had been made by the petitioner, Chicago Land Clearance Commission, since the Circuit Court denied all discovery of such matters (A. 116) and the appellee did not produce one witness on its own who even purported to have taken part in any study of the area prior to designation.

II.

Appellee's Brief Demonstrates on its Face the Denial of the Equal Protection of Laws.

Appellee, in arguing that appellants were not denied equal protection, states that mere "preliminaries", as ap-

pellee would have them, are insignificant,* and since both conservation defendants and slum clearance defendants can having hearings in the condemnation proceedings, no significant or judicially recognizable difference exists.

The Illinois legislature thought otherwise, having inserted *two* provisions for hearings in the conservation sections of the Consolidation Act (67½ Ill.Rev.Stat. 1961 §§91.120(b), 121). It cannot be assumed to have done so as an exercise in grammar. The face of the statute makes clear that the legislature felt something significant happened at the designation level.

III.

Payment of Just Compensation Does Not Abolish the Constitutional Requirement of Public Use.

Throughout Appellee's Motion and Brief there runs an assumption, sometimes tacit, sometimes explicit; that is, that the constitutional requirement of public use is either moribund or dead, and that, in slum clearance, *Berman* v. *Parker*, 348 U.S. 26 (1954) virtually removed the requirement from the field of constitutional law. Appellants will seek to demonstrate not only that this position has not been reached by this Court; but also that the problems of public use, as applied to federally financed urban re-

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* By the "preliminaries" appellee refers to the designation of the area by the Land Clearance Commission, and the passage of the City Council ordinances ratifying that determination. Appellee argues that the first is relevant only if it is useful to keep Harrison-Halsted residents from contesting their status as of the date of condemnation (Motion and Brief, p. 3); and the second is relevant only for the purpose of arguing that there was a hearing prior to governmental action.

newal and under the United States Constitution, present substantial problems of federal law not yet wholly resolved. These problems will be faced by the Court in the instant case.

A. Just Compensation Does Not Satisfy All Constitutional Rights.

Appellee argues (Motion and Brief, pp. 4-7) that since Appellants do not contest the condemnation award made in this case, they cannot complain of grievances as to the Illinois procedures in eminent domain and urban renewal. Appellee would require them to liquidate their grievances into some monetary claim or sum. Appellee's argument requires a conception of just compensation wherein all property of a citizen has an inchoate price tag attached to it and the state in which he resides has a running option to pay that price.

Appellants, on the other hand, assert that a wrongful taking is damage per se and needs no liquidation to a monetary sum or claim; indeed, if Appellee were correct the law of eminent domain would consist merely of the adjudication as to which of two prices would be available to the condemning body; a price for illegal takings and a price for legal takings. To this date the courts have held that there is no price at which land can be acquired illegally.

Appellee complains (Motion and Brief p. 6) that the record offers no proof that the injuries alleged by appellants would be substantial. Appellee completely ignores that evidence and discovery on any issues of these was denied by the Circuit Court. In effect, the Circuit Court sustained a demurrer to every portion of appellee's traverses other than the status of the Roosevelt-Blue Island

Tract (A. 115). Of course, the record is devoid of evidentiary proof on these points; but without having committed a contempt of court in the Circuit Court, appellants were without power to provide such proof.

B. Berman v. Parker Defines Rather Than Eliminates the Public Use Requirement.

The Court will note that both sides in this litigation and in the related federal case No. 861 refer constantly to *Berman* v. *Parker*, 348 U.S. 26 (1954) as a source of law. A review of that critical case is in order here. *Berman* v. *Parker* was an attack upon the District of Columbia urban renewal program and a reversal of a lower court case, *Schneider* v. *District of Columbia*, 117 F.Supp. 705 (1953). The plaintiff, seeking an injunction in the District Court, attacked the constitutionality of the urban renewal statute on the ground that the property (to be sold to a private redeveloper) was being taken for a private use and that his building, apparently admittedly a sound structure, was not slum or blighted. This Court held that Congress acting in the urban renewal field was exercising the police power over the District and that reasonable men might have concluded that the elimination of slums on an orderly basis was necessary for the public health and safety. The Court then affirmed what had even prior to *Berman* been the law in Illinois: slum clearance per se is a public use; it may proceed on an area rather than a building by building basis; sound property within an area may be taken; and the sale to a private redeveloper does not vitiate the public use. See *Zurn* v. *City of Chicago*, 389 Ill. 114 (1945); *Ross* v. *Chicago Land Clearance Commission*, 413 Ill. 377 (1952); *Chicago Land Clearance Commission* v. *White*, 411 Ill. 310 (1952).

Secondly, *Berman* v. *Parker* stands for another important proposition in the field of constitutional law; the

constitutional requirement of "public use" will not be a mask behind which the courts will re-erect the discarded concept of substantive due process and sit in review of the wisdom of public projects. The quotation from the case contained in appellee's Motion and Brief (p. 13) is quoted without noting the significant and consistent use of the word "may". The Court states, in the famous passage so quoted, what the legislature *might* have had in mind; what reasonable men *could* have held. *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).*

But this Court made a third finding: urban renewal is an exercise of the police power. *Berman* v. *Parker*, 348 U.S. 26, 32 (1954). What this means in the instant case, in urban renewal generally, and for the future, is that prior case law referring to "legislative" decisions to take land has limited relevance. Cases cited by Appellee such as *Bragg* v. *Weaver*, 251 U.S. 57 (1919); *Rindge* v. *County of Los Angeles*, 262 U.S. 700 (1923) are good law in the general field of eminent domain. But urban renewal is not part of the general field of eminent domain.

The State of Illinois has a general power of eminent domain, as an attribute of sovereignty; but its right to exercise the police power is not plenary, and it cannot extend its police power by referring to its overall right to condemn. This distinction has been noted by a prominent commentator:

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* The purpose of the language is that of the famous brief of Louis D. Brandeis in **Muller v. Oregon**, 208 U.S. 412 (1908), which brief closes (p. 113) with the statement:

> "We submit that in view of the facts above set forth [a long parade of expert medical and sociological data] it cannot be said that the Legislature of Oregon had no reasonable ground for believing that the public health, safety, or welfare would not require a legal limitation on women's work . . . to ten hours in one day."

> "That government may use the eminent domain power to achieve almost any public purpose does not dispose of the question. Regulation as a means of achieving a governmental objective cannot necessarily be used wherever the eminent domain power may be used." Dunham, *Griggs* v. *Allegheny County in Perspective*, 1962 Sup. Ct. Rev. 63, 73.

The instant case presents that coupling of police power and eminent domain which is inevitable in all urban renewal, and will be characteristic of many federally subsidized programs to come. Hence the constitutional issues raised are novel, without guidance from the past; and substantial in extent. See Opposition Brief of the Solicitor General in the related Federal case, No. 861, p. 15.

IV.

Appellee Distorts the Evidence in Attempting to Escape the Fatal Vagueness of the Illinois Statute.

Appellee, to begin with, asserts that appellants failed to raise the question of vagueness below (Motion and Brief p. 11). Major aspects of the vagueness problem were in the record only *after* the Illinois Supreme Court rendered its opinion, and were created by it; but at all times below the parties have been deeply concerned with the vague definitions of the Illinois statute. Appellants in their brief in the Illinois Supreme Court (pp. 131-136, 139, 146, 147) attached the inconsistency and vagueness of the Illinois definitions, in showing the inadequacy of the evidence to support any plausible definition.*

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* Because this point has been raised, appellants plan to file a supplemental record consisting of their brief in the Illinois Supreme Court. A motion for leave to file this record will either precede or follow the filing of this brief in short order.

In a selective analysis of some of the evidence, appellee attempts to make easy a problem which seriously troubled the trial judge and counsel before the trial court, and which is built into the Illinois statute. For example, appellee states (Motion and Brief p. 12) that its witnesses all agreed that "dilapidation means substantial physical deterioration", a statement which seriously distorts the testimony of appellee's witnesses, who were primarily concerned with the economic aspects of physical decline. Space does not permit complete elaboration, but the following citations to the record by witness and abstract page number may suffice:

Farren, 309, 311-312; Lannon, 317, 318-321; Walman, 336, 337, 338, 340; Renzi, 347-348, 349, 352; Hult, 354, 355, 357; Leyden, 361, 363-365.

Appellee's statement "All expert witnesses agreed . . . that 'obsolescence' means conditions which render a building so outmoded as to be inappropriate as a dwelling" cannot be supported by the testimony submitted by appellee below. Space does not permit a complete quotation of each of the various definitions, but the following:

Farren, 309, 312-13, 315; Lannon, 324, 326, 327, 328; Walman, 337, 342-43; Renzi, 348, 350-52; Hult, 354, 357-58; Leyden, 362, 365-66.

Appellee further states, "The other terms in the statute are words in common use", but appellants suggest that "deleterious land use," and "faulty arrangement or design", are neither terms of art nor in the common language of ordinary me

The full problem of the vagueness of the Illinois statute was not apparent until the Supreme Court rendered its opinion. A loose discretionary definition of slum and blight without fixed minimum or standard was, perhaps, tolerable as long as there had to be a finding that the physical defects led to adverse social conditions.* The Illinois Supreme Court, within the proper scope of its authority, has determined that the Illinois legislature made a conclusive legislative finding that the enumerated physical factors were detrimental to the public health and welfare. But the removal of the requirement of proof as to adverse social effect removes a substantial element of certainty from the statute. Hence, the significance of the vagueness of the physical terms, as also created by the Illinois Supreme Court, is apparent only when it is realized that the Court imposed no other restraint of any kind upon the condemning body.**

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* Appellee's statement, (Motion and Brief p. 14) as to the health statistics, ignores the insignificantly small number of instances as to which testimony was introduced. Since the Illinois Supreme Court has ruled that the facts in this regard are irrelevant, further elaboration is not needed.

** Appellee argues that the prior case law of vagueness relates solely to penal statutes. But urban renewal statutes are in many ways exactly such statutes. It should be remembered that under **Berman v. Parker**, 348 U.S. 26 (1954), the faultless owner of sound property can lose that property because of the conduct and situation of his neighbors. In many ways this goes beyond a penal statute since an innocent man's own conduct may not be used as a defense.

V.

The Applicability of the Federal Housing Act Presents a Substantial Federal Question.

Appellee's brief (pp. 16-21) presents no new arguments with regard to the applicability of the federal Housing Act to local condemnation proceedings beyond those advanced by the Illinois respondents in No. 861. Appellants have consistently maintained that the Act binds the local agency by reason of the Supremacy clause to the United States Constitution (U.S. Const., Art. VI); by reason of the contract between the United States and the local public agency; and because the federal Housing Act intended persons in the status of these appellants to be protected by certain provisions of the Act.

Appellee, in meeting these arguments, again brings forward its universal remedy of *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), the irrelevance of which has already been demonstrated in the Petition for Certiorari in No. 861 (pp. 17-19) and in the Jurisdictional Statement (pp. 32-33).

VI.

Affidavits and Stipulations Admitted and Contested.

Appellee contends that in No. 861 the appellants deny the authenticity of documents which in the instant case have been stipulated. (Motion and Brief p. 21) However, an examination of the stipulation referred to (A. 451-477) indicates that the only thing agreed to by counsel for appellants was that certain papers were filed with the Housing and Home Finance Agency and some of them were adopted by the bodies referred to on the dates mentioned. However, appellants have not, and the careful wording of the stipulation clearly shows that they

have not, agreed that the facts shown, for example, in the Chicago Plan Commission Resolution of October 6, 1960 (A. 457-458, are correct; all that has been stipulated was that on October 6, 1960, the resolution set forth was adopted by the Plan Commission and a copy of it was forwarded to the Housing and Home Finance Agency. As to the relocation plans, all that was stipulated was that three documents so described were filed with the Housing and Home Finance Agency.

VII.

Other Questions.

Appellants assume that this Court can examine the Jurisdictional Statement in *Grisanti* v. *The City of Cleveland,* 371 U.S. 68 (1962) (No. 535 this term), which in its total context clearly is a different case from the instant one. The cases referred to (Motion and Brief, pp. 7 and 8) on examination will be found almost universally to refer to issues settled in *Berman* v. *Parker,* 348 U.S. 26 (1954). As to Appellants' aims in this litigation, both in the instant case and in the related federal case No. 861, they are as follows: As to the Harrison-Halsted Tract, they seek to void the illegal change of plans from residential to institutional use; as to the western half of the Congress-Racine Tract, they seek to void the illegal conversion of that tract from a residential conservation plan to clearance and institutional use; as to the eastern half of the Congress-Racine Tract and the entire Roosevelt-Blue Island Tract, they seek to void all action whatsoever. This is not an action to compel residential redevelopment; it is an action to preclude illegal redevelopment.

CONCLUSION.

Appellants accordingly submit that the motion to dismiss should be denied as it has been shown that the Questions Presented are federal in nature, substantial in extent, and hitherto undecided.

Respectfully submitted,

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APPENDIX TO APPELLANTS' BRIEF IN OPPOSITION.

Urban Renewal Consolidation Act, 67½ Ill.Rev.Stat. §91.123(k):

"(k) In case of contumacy or refusal to obey a subpoena issued to any person, the Circuit or Superior Court of the county in which such person resides or has his principal place of business, upon application by the Department, shall have jurisdiction to issue to such person an order requiring such person to appear before the Department or before any member, employee or agent thereof designated to conduct such hearing there to produce evidence, if so desired, or there to give testimony touching the matter under investigation and any failure to obey such order of the Court may be punished by said court as a contempt thereof.

"The officials of any city, village or town and the members of any zoning commission shall, when requested so to do by any member of the Department, make available for inspection by the Department or by any committee, employee or agent of the Department, any and all records and data which they may have pertaining to an area which is then being investigated."

(Other sections of the Act are in the Appendices to the Jurisdictional Statement)